No. 43219-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Gary Lindsey,

Appellant.

Cowlitz County Superior Court Cause No. 11-1-00721-6

The Honorable Judges Stephen Warning and Marilyn Haan

Appellant's Opening Brief

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1. Mr. Lindsey's conviction infringed his Fourteenth Amendment right to due process, because the court instructed the jury on an uncharged alternative means of committing trafficking in stolen property.

2. The trial court erred by giving Instruction No. 6.

3. The trial court erred by giving Instruction No. 9.

4. The trial judge erred by denying Mr. Lindsey's request for appointment of new counsel.

5. The trial judge applied the wrong legal standard in denying Mr. Lindsey's request for new counsel.

6. The trial judge erred by failing to inquire into the extent of the conflict between Mr. Lindsey and his court-appointed attorney.

7. Mr. Lindsey was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

8. Mr. Lindsey's conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.

9. Mr. Lindsey's conviction violated his state constitutional right to notice of the charges against him, under Wash. Const. Article I, Sections 3 and 22.

10. The Information was factually deficient because it failed to allege specific facts describing Mr. Lindsey's alleged conduct.

11. Mr. Lindsey was denied his state constitutional right to a unanimous verdict.

12. The trial court erred by instructing jurors on five of the alternative means of committing trafficking in stolen property.

13. The trial court erred by entering a judgment of conviction based on a general verdict where the evidence was insufficient to support five of the alternative means of committing the charged crime.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is reversible error to instruct a jury on an uncharged alternative means of committing a crime. In this case, the trial judge instructed the jury on an uncharged alternative means of committing trafficking in stolen property in the first degree. Did Mr. Lindsey's conviction violate his Fourteenth Amendment right to due process?

2. An accused person has a constitutional right to be represented by counsel, and to have counsel appointed if indigent. When Mr. Lindsey asked for the appointment of new counsel and described problems in the attorney-client relationship, the trial court denied his request without sufficient inquiry. Did the court's refusal to appoint new counsel and failure to inquire sufficiently into the attorney-client relationship violate Mr. Lindsey's Sixth and Fourteenth Amendment right to counsel?

3. An accused person is constitutionally entitled to notice that is both legally and factually adequate. The Information in this case failed to outline specific facts describing his alleged conduct. Was Mr. Lindsey denied his constitutional right to adequate notice of the charge under the Fifth, Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 3 and 22?

4. An accused person has a constitutional right to a unanimous verdict, including unanimity as to the means by which the crime was committed. Here, the evidence was insufficient to establish five of the alternative means submitted to the jury. Did Mr. Lindsey's conviction violate his right to a unanimous verdict under Wash. Const. Article I, Section 21?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Gary Lindsey was charged with Trafficking in Stolen Property in the First Degree.[1] CP 1. The Information alleged that he "did knowingly organize, plan, finance, direct, manage and/or supervise the theft of property, to wit: steel tank and/or cover, for sale to others, or did knowingly traffic in stolen property, to wit: steel tank and/or cover..." CP 1. The Information included no additional details, other than the offense date and the county in which it was alleged to have occurred. CP 1.

Prior to trial, a conflict arose between Mr. Lindsey and his attorney. The attorney brought the matter before the court, but announced that Mr. Lindsey wanted to waive the conflict. RP 1-2. The nature of the conflict was not disclosed. RP 1-2.

Several weeks later, counsel referenced the conflict and indicated that Mr. Lindsey wanted a new attorney. RP 3. He disclosed that Mr. Lindsey had "personal misgivings with me," and didn't "trust that I will adequately represent him." RP 3. Mr. Lindsey addressed the court, and said several times that he didn't feel his attorney was trying to help him.

[1] A companion charge of driving while suspended was dismissed prior to trial. RP 18.

RP 4, 6. When the judge attempted to reassure him, he continued to express his misgivings. RP 7, 8.

The issue arose once more at the start of trial, when counsel again told the court that Mr. Lindsey wanted a new attorney. RP 13. He added that Mr. Lindsey had hung up on him during a telephone conversation, and that Mr. Lindsey's feelings might prevent him from listening to his attorney's advice. RP 13, 17. Mr. Lindsey confirmed that he did not trust his attorney, and that they had argued heatedly. RP 14-15. The court denied his request, and trial began that day. RP 18-24.

At trial, the prosecution introduced evidence showing that the steel tank sat next to a scrap dumpster outside a warehouse. RP 33-36. Prior to its theft, someone had attempted to move it. RP 54. No evidence connected Mr. Lindsey to this attempt. RP 33-93.

Mr. Lindsey visited the scrap dumpster, accompanied by another man. RP 37-39. He was given permission to take some discarded cables, and told to ask before taking anything else from the dumpster. RP 39-41. Shortly thereafter, the tank was moved again. A few days later, it was missing. RP 42-43.

Mr. Lindsey was subsequently arrested trying to sell the tank and its cover for scrap. RP 62-65. He denied having taken it, and told the officer who arrested him that he'd purchased it from Jack Patching, Jr. RP

79. He acknowledged that he knew Patching was a thief, and that the tank was likely stolen. RP 81. After being arrested, Mr. Lindsey said that he'd taken the tank himself. At trial, this statement was relayed to the jury by the arresting officer:

> A. [H]e at one point said, "I might as well be honest with you. I took it. There is no sense in both of us going down for the same thing."
> Q. Did he say someone had been there with him when he took it?
> A. Yeah, he said, "Jack was there." He goes, "But there is no sense in both of us going down for the same thing."
> Q. And he told you he took the tank?
> A. Yes.
> RP 82; see also RP 91.

At the conclusion of the evidence, the court instructed the jury on the definition of first-degree trafficking in stolen property. Instruction No. 6, Supp. CP. The court's "to convict" instruction on the elements of first-degree trafficking included the following language:

> To convict the defendant of the crime of Trafficking in Stolen Property in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on, about, or between July 8 and July 11, 2011, the defendant knowingly (a) initiated, organized, planned, financed, directed, managed, and/or supervised the theft of property for sale to others; or (b) trafficked in stolen property with the knowledge that the property was stolen...
>
> Instruction No. 9, Supp. CP.

Mr. Lindsey was convicted, and sentenced to 63 months in prison. Verdict, Supp. CP; CP 3. He timely appealed. CP 18.

ARGUMENT

I. MR. LINDSEY'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING FIRST-DEGREE TRAFFICKING IN STOLEN PROPERTY.

A. Standard of Review

Constitutional errors are reviewed de novo. Bellevue School Dist. v. E.S., 171 Wash.2d 695, 702, 257 P.3d 570 (2011).

B. Mr. Lindsey was tried on an uncharged alternative means of committing first-degree trafficking in stolen property.

In criminal cases, it is reversible error to instruct the jury on an uncharged alternative means. State v. Laramie, 141 Wash.App. 332, 343, 169 P.3d 859 (2007); State v. Chino, 117 Wash.App. 531, 540, 72 P.3d 256 (2003). Where the Information alleges only certain alternative means of committing a crime, the jury may not be instructed on other uncharged alternatives, regardless of the strength of the evidence; this is so because a defendant cannot be tried for an uncharged offense. Chino, at 540.

First-degree trafficking in stolen property is an alternative means crime: the offense may be committed "by eight alternative means." State v. Strohm, 75 Wash. App. 301, 307, 879 P.2d 962 (1994). These eight alternative means are set forth in the first section of the statute: "'A person who knowingly [1] initiates, [2] organizes, [3] plans, [4] finances, [5]

directs, [6] manages, or [7] supervises the theft of property for sale to others, or [8] who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.'" Id, at 307 (quoting RCW 9A.82.050(1)) (alterations in original).

Mr. Lindsey was charged under alternatives (2)-(8). The prosecution did not allege that he'd initiated the theft of property for sale to others. CP 1. Despite this, the court instructed the jury on the "initiates" alternative. Instruction No. 9, Supp. CP. Because the jury returned a general verdict, the error is presumed prejudicial. Verdict, Supp. CP. Chino, supra. Accordingly, Mr. Lindsey's conviction must be reversed and the charge remanded for a new trial. Id.

II. THE TRIAL JUDGE VIOLATED MR. LINDSEY'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL BY REFUSING TO APPOINT A NEW ATTORNEY.

A. Standard of Review

Constitutional errors are reviewed de novo. E.S., at 702. A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion. State v. Cross, 156 Wash.2d 580, 607, 132 P.3d 80 (2006). The reviewing court considers three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry

into that conflict, and (3) the timeliness of the motion for appointment of new counsel. Id.

A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. United States v. Lott, 310 F.3d 1231, 1248-1250 (10th Cir, 2002); see also State v. Lopez, 79 Wash.App. 755, 767, 904 P.2d 1179 (1995), overruled on other grounds by State v. Adel, 136 Wash.2d 629, 965 P.2d 1072 (1998).

B. The trial judge infringed Mr. Lindsey's right to counsel by refusing to appoint new counsel.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused's Sixth Amendment right, even in the absence of prejudice. Cross, at 607. To compel an accused to "'undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.'" United States v. Williams, 594 F.2d 1258, 1260 (9th Cir. 1979) (quoting Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970)).

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. Cross, at 607-610; United States v. Adelzo-Gonzalez, 268 F.3d 772 (9th Cir. 2001). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. Cross, at 610. The court

"must conduct 'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern.' ...The inquiry must also provide a 'sufficient basis for reaching an informed decision.'" Adelzo-Gonzalez, at 776-777 (citations omitted). Furthermore, "in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." Id., at 777-778. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. Id., at 778-779.

In this case, the trial court abused its discretion by failing to adequately inquire into the conflict and by refusing to appoint new counsel. Defense counsel told the court there was a potential conflict of interest, but that Mr. Lindsey had elected to waive it. RP 1-2. Mr. Lindsey repeatedly expressed his lack of trust in his lawyer, and asked for new counsel. RP 3-8. By the day of trial, he'd hung up on his lawyer, they'd had heated arguments, and counsel expressed concern that Mr. Lindsey's misgivings might prevent him from listening to advice. RP 13-18.

Despite this, the trial judges failed adequately inquire into Mr. Lindsey's concerns, and failed to appoint new counsel. RP 1-18. Mr. Lindsey's distrust, the heated arguments he had with counsel, the fact that he hung up on counsel, and counsel's concern that his client might not be

able to listen to his advice all indicate that the relationship had deteriorated to the point where the two could not work together. Cross, at 607; Williams, at 1260.

The trial court should have appointed new counsel. Failing that, the judges hearing the case should have asked specific and targeted questions, encouraged Mr. Lindsey to fully air his concerns, developed an adequate basis for a meaningful evaluation of the problem and an informed decision, and conducted an inquiry sufficient to ease Mr. Lindsey's dissatisfaction, distrust, and concern. Cross, at 610; Adelzo-Gonzalez, at 776-779.

The trial court's failure to do these things denied Mr. Lindsey his Sixth Amendment right to counsel. Cross, supra. His conviction must be reversed and the case remanded for a new trial.[2] Id.

[2] In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict, and for a new trial if the conflict was sufficient to require appointment of new counsel. See, e.g., Lott, at 1249-1250 (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

III. MR. LINDSEY'S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS RIGHT TO NOTICE UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND UNDER WASH. CONST. ARTICLE I, SECTIONS 3 AND 22.

A. Standard of Review.

Constitutional questions are reviewed de novo. E.S., at 702. A challenge to the constitutional sufficiency of a charging document may be raised at any time. State v. Kjorsvik, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. Id, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. Id, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. State v. Courneya, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); State v. McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. Mr. Lindsey was constitutionally entitled to notice that was factually adequate.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the federal constitution, as well as Article I, Section 3 and Article I, Section 22 of the Washington State Constitution. The right to a constitutionally sufficient Information is one that must be

"zealously guarded." State v. Royse, 66 Wash.2d 552, 557, 403 P.2d 838 (1965).

A constitutionally sufficient charging document must notify the accused person of the essential elements of the offense and of the underlying facts alleged. The rule

> requires that a charging document allege facts supporting every element of the offense, in addition to adequately identifying the crime charged. This is not the same as a requirement to 'state every statutory element of' the crime charged.

State v. Leach, 113 Wash.2d 679, 689, 782 P.2d 552 (1989) (emphasis in original). The Leach court addressed the rationale for requiring a statement of the essential facts when a defendant is charged by Information:

> Complaints must be more detailed since they are issued by a prosecutor who was not present at the scene of the crime. Defining the crime with more specificity in a complaint assists a defendant in determining the particular incident to which the complaint refers... [Where a citation is issued at the scene, the defendant] presumably know[s] the facts underlying [the] charges.

Id, at 699. Following Leach, the Supreme Court elaborated on this aspect of the essential elements rule:

> The primary purpose is to give notice to an accused so a defense can be prepared. There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. As we recently made clear in Kjorsvik, the "core holding of Leach requires that the defendant be apprised of the elements of

> the crime charged and the conduct of the defendant which is alleged to have constituted that crime." Leach noted that often charging documents are written by alleging specific facts which support each element of the crime charged.

Auburn v. Brooke, 119 Wash.2d 623, 629-630, 836 P.2d 212 (1992) (footnotes omitted, emphasis in original).

C. The Information was factually deficient because it did not include specific facts supporting each element of the offense.

First-degree trafficking in stolen property may be committed "by eight alternative means." Strohm, at 307. These eight alternative means are set forth in the first section of the statute: "'A person who knowingly [1] initiates, [2] organizes, [3] plans, [4] finances, [5] directs, [6] manages, or [7] supervises the theft of property for sale to others, or [8] who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.'" Id, at 307 (quoting RCW 9A.82.050(1)) (alterations in original).

In this case, the Information alleged seven of the eight alternative means, but did not provide any facts apprising Mr. Lindsey of the underlying conduct that formed the basis for the allegation. CP 1. Instead, the charging document simply parroted the language of the statute (identifying only the venue, date, and object stolen) without specifying the actions Mr. Lindsey was alleged to have undertaken.

In the absence of any details outlining his alleged conduct, the charging document was factually deficient because it did not provide "a description of the specific conduct of the defendant which allegedly constituted that crime." Brooke, at 629-630 (emphasis in original). Nor can the underlying facts be inferred from the language used in the Information. CP 1. Accordingly, Mr. Lindsey need not demonstrate prejudice. Courneya, at 351 n. 2; McCarty, at 425. His conviction must be reversed, and the case dismissed without prejudice. Id.

IV. MR. LINDSEY WAS DENIED HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

A. Standard of Review

Constitutional violations are reviewed de novo. E.S., at 702.

B. The state constitution guarantees an accused person the right to a unanimous verdict.

An accused person has a state constitutional right to a unanimous jury verdict.[3] Wash. Const. Article I, Section 21; State v. Elmore, 155 Wash.2d 758, 771 n. 4, 123 P.3d 72 (2005). The right to a unanimous verdict also includes the right to jury unanimity on the means by which the defendant is found to have committed the crime. State v. Lobe, 140 Wash.

[3] The federal constitutional guarantee of a unanimous verdict does not apply in state court. Apodaca v. Oregon, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

App. 897, 903-905, 167 P.3d 627 (2007). A particularized expression of unanimity (in the form of a special verdict) is required unless there is sufficient evidence to support each alternative means submitted to the jury. State v. Ortega-Martinez, 124 Wash.2d 702, 707-708, 881 P.2d 231 (1994).

If one or more alternatives are not supported by sufficient evidence, the conviction must be reversed. Lobe, supra. Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

C. The evidence was insufficient to establish five alternative means of committing first-degree trafficking in stolen property.

As noted above, Mr. Lindsey was charged with seven of the eight alternative means of committing the offense. However, there was insufficient evidence for conviction on at least five of these alternative means.

Specifically, even when taken in a light most favorable to the prosecution, there was little to no evidence that Mr. Lindsey organized, directed, managed, or supervised the theft of property for sale to others, as each of these implies responsibility over the actions of at least one other

person. There was evidence that Jack Patching, Jr. was present during the theft, but the state presented no evidence that Mr. Lindsey was in charge—that he organized, directed, managed, or supervised the operation—or even that Patching actually participated in any way.

Furthermore, nothing in the record suggests that Mr. Lindsey financed the operation. The state presented no evidence that costs were incurred, or that Mr. Lindsey provided the funding to defray such costs.

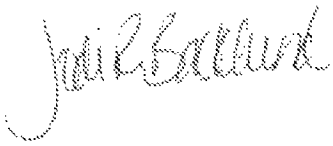
Because the evidence was insufficient to establish five of the alternative means submitted to the jury, Mr. Lindsey was denied his constitutional right to a unanimous jury. Lobe, supra. Since there was no special verdict, the conviction must be reversed and the case remanded for a new trial. Id.

CONCLUSION

For the foregoing reasons, the conviction must be reversed. The case must either be dismissed without prejudice or remanded for a new trial. Mr. Lindsey may not be retried on any theory for which the state presented insufficient evidence.

Respectfully submitted on August 22, 2012,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

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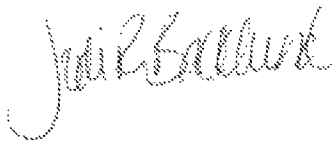
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 22, 2012.



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